



CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, CA 95814

**NOTICE OF PROPOSED ADOPTION OF REGULATIONS
AND STATEMENT OF REASONS**

**California Code of Regulations
Title 2, Administration
Division 1, Administrative Personnel**

DATE: December 21, 2001

TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET

SUBJECT: Whistleblower Retaliation Regulations

AUTHORITY:

Under authority established in Government Code Section 18701, the State Personnel Board (SPB) has proposed to adopt Sections 56 through 56.6 to Title 2 of the California Code of Regulations, to provide procedures for the filing and processing of whistleblower retaliation complaints filed with SPB pursuant to the provisions of Government Code Sections 8547.8 and 19683.

REFERENCE:

These regulations are enacted to implement, interpret, and/or make specific Government Code Sections 8547.8 and 19683.

PUBLIC HEARING:

Date and Time: February 5, 2002, from 1:00 p.m. to 1:30 p.m.
Place: Auditorium
801 Capitol Mall, Room 150
Sacramento, California 95814
Purpose: To receive oral public comments about this action.

WRITTEN PUBLIC COMMENT PERIOD:

The public comment period for written comments will close February 4, 2002, at 5:00 p.m. This is to allow time for SPB staff to provide copies of any written comments to the five-member State Personnel Board (Board) for their consideration at the time of the hearing; however, any person may also submit written comments about the proposed changes at the hearing. To be considered by the Board, written comments must be received by Bruce Monfross at the State Personnel Board, P.O. Box 944201, Sacramento, CA 94244-2010, before the close of the written comment period. During

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the 45-day written comment period, written comments may also be e-mailed to Bruce Monfross at bmonfross@spb.ca.gov or faxed to (916) 653-4256.

AVAILABILITY OF PROPOSED TEXT AND STATEMENT OF REASONS/CONTACT PERSONS:

Copies of the express terms of the proposed action, the Statement of Reasons, and all of the information upon which the proposal is based are available upon request directed to SPB's contact person. The rulemaking file is available for review during normal business hours at the State Personnel Board, 801 Capitol Mall, Sacramento, CA 95814. Please contact Bruce Monfross at (916) 653-1403 or TDD (916) 653-1498 for additional information regarding this action. The backup agency contact for this action is Steve Unger at the State Personnel Board, P.O. Box 944201, Sacramento, CA 94244-2010, (916) 651-8461 or TDD (916) 653-1498. Questions regarding the substance of these regulations should be directed to the contact person. Questions regarding the regulatory process in conjunction with these regulations should be directed to the backup contact person.

AVAILABILITY OF CHANGES TO PROPOSED TEXT:

If any substantial and sufficiently related changes are made to the text as a result of comments received during the public comment period, SPB will make the full text of the changed regulation(s) available for at least 15 days before the date the regulation is permanently amended.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW:

Government Code Section 18701 authorizes SPB to prescribe, amend, and repeal regulations for the administration and enforcement of the Civil Service Act.

Government Code Section 8547.8 authorizes state employees or applicants for state employment to file a complaint with SPB if the employee or applicant believes that he or she has been retaliated against in employment for having engaged in whistleblowing activities.

Government Code Section 19683 authorizes SPB to investigate and conduct hearings concerning complaints of whistleblower retaliation filed by state employees or applicants for state employment.

SPB is proposing to add Sections 56 through 56.6 to Title 2 of the California Code of Regulations in order to:

1. Set forth the filing requirements that a state employee or applicant for state employment must adhere to when filing a whistleblower retaliation complaint with SPB.

2. Set forth the process and timelines for responding to whistleblower retaliation complaints.
3. Set forth the discovery process for whistleblower retaliation complaints.
4. Set forth the requirements for decisions concerning whistleblower retaliation complaints, including the remedies available to complaining parties.
5. Set forth the appeal rights for all parties to a whistleblower retaliation complaint.

IMPACT ON SMALL BUSINESSES:

No impact on small businesses is anticipated from the implementation of the proposed amendments. Government Code Sections 8547.8 and 19683 apply only to state agencies. The proposed regulations will affect only state agencies and state employees and applicants for state employment.

LOCAL MANDATE:

SPB has determined that the proposed action has no mandate upon local agencies or school districts and therefore requires no reimbursement pursuant to Section 17561 of the Government Code.

COST ESTIMATES OF PROPOSED ACTION:

Costs or Savings to State Agencies:

The proposed regulations have been created in order to clarify the procedures set forth in Government Code Sections 8547.8 and 19683. It is anticipated that any additional costs that the proposed regulations may cause for state agencies will be insignificant.

Impact on Housing Costs:

The proposal will not affect housing costs.

Costs or Savings in Federal Funding to the State:

No impact.

Costs or Savings to Local Agencies or School Districts Required to be Reimbursed:

No costs to local agencies or school districts are required to be reimbursed.

Other Nondiscretionary Costs or Savings Imposed on Local Agencies:

The proposal does not impose nondiscretionary costs or savings on local agencies.

Cost Impact on Representative Private Persons or Businesses:

SPB is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

ASSESSMENT OF POTENTIAL ADVERSE ECONOMIC IMPACT ON BUSINESS:

SPB has made an initial determination that the proposed action will have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states.

ASSESSMENT REGARDING THE EFFECT ON JOBS OR BUSINESSES:

The adoption of the proposed regulations will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

DETERMINATION:

SPB must determine that no alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which this action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

SPB invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the scheduled hearing or during the written comment period.

FINAL STATEMENT OF REASONS:

It is anticipated that the proposed regulations will be filed with the Office of Administrative Law pursuant to Government Code Section 18214, under which no Final Statement of Reasons is required. If a Final Statement of Reasons is nevertheless prepared, it may be obtained from the contact person or the backup contact person when it becomes available.

ACCESSING INFORMATION REGARDING THIS RULEMAKING FILE ON THE STATE PERSONNEL BOARD WEB SITE:

The text of the proposed regulations, the Notice of Proposed Adoption of Regulations and Statement of Reasons, and if prepared and when available for review, the Final Statement of Reasons, will be on the SPB Web site at: www.spb.ca.gov.

STATEMENT OF REASONS:

California's Whistleblower Protection Act (Government Code Section 8547 *et seq.*) and specific provisions of California's Civil Service Act (Government Code Section 19683) protect state employees and applicants for state employment from retaliation in employment for having reported improper governmental activities or for having refused to obey an illegal order or directive. These statutes specify that state employees or applicants for state employment who believe that they have been retaliated against for having engaged in such activities may file a complaint with SPB. These proposed

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regulations will add Sections 56 through 56.6 to Title 2 of the California Code of Regulations, and are designed to codify the process for filing, processing, hearing, and deciding complaints of whistleblower retaliation in state service. The proposed regulations have been created in order to clarify the process set forth by the legislature in Government Code Sections 8547.8 and 19683 concerning whistleblower retaliation complaints filed by state employees and applicants for state employment who believe they have been retaliated against for having engaged in whistleblowing activities. The proposed regulations were designed for the following reasons:

1. To inform individuals filing whistleblower retaliation complaints with SPB the exact information that their complaint must contain so that it can be processed and decided in a timely manner.
2. To inform complaining and responding parties of the standards and procedures utilized by SPB in processing whistleblower retaliation complaints, including the ability of the parties to conduct discovery, to respond to the allegations, and the time frame for the Executive Officer to issue a Notice of Findings concerning the complaint.
3. To inform complaining and responding parties of the appeal rights they possess to the Notice of Findings issued by the Executive Officer.
4. To inform the parties of what disciplinary actions may be taken against individuals who are found to have engaged in impermissible retaliation.

Mike Willihnganz
Chief, Policy Division

Attachment: Text of Proposed Adoption of Regulations



CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, California 95814

Regulations Governing Whistleblower Retaliation Complaints

All new text is indicated by underline. A double underline with italics indicates new text that is intended to be single underlined in the final printing.

Title 2. ADMINISTRATION

Division 1. Administrative Personnel

Chapter 1. State Personnel Board

§ 56. Whistleblower Retaliation Complaint Process.

Any person who believes that he or she has been retaliated against in state employment for having reported improper governmental activity, as that phrase is defined in Government Code Section 8547.2(b), or for having refused to obey an illegal order or directive, as defined in Government Code Section 8547.2(e), may file a complaint and/or appeal with the Board in accordance with the provisions set forth in Sections 56.1-56.7. The discovery provisions set forth in Sections 57.1-57.4 shall be applicable to whistleblower retaliation complaints that are assigned to an evidentiary hearing before a Board administrative law judge.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.1. Requirements for Filing Whistleblower Retaliation Complaint with the Appeals Division of the Board.

An individual desiring to file a complaint of retaliation with the Board must adhere to the following requirements:

- (a) Prior to filing his or her complaint with the Board, the complainant shall comply with all other filing requirements, if any, set forth in Government Code Section 19683.
- (b) The complaint shall be filed with the Appeals Division within one year of the most recent alleged act of reprisal.
- (c) The complainant shall serve a copy of the complaint of retaliation, and all accompanying documents, on his or her appointing power, and on each named employee alleged to have retaliated against the

complainant, on or before the same date that he or she files his or her complaint with the Appeals Division.
Service shall be made in accordance with the provisions of Section 51.2(f).

(d) All complaints shall be in writing.

(e) Each complaint shall:

(1) identify the facts that form the basis of the complaint, including, but not limited to: the improper governmental activity that the complainant reported, or the illegal order or directive the complainant refused to obey; the date the complainant reported the improper governmental activity, or refused to obey the illegal order or directive; the person(s) to whom the complainant reported the improper governmental activity, or to whom the complainant stated that he or she would not obey the illegal order or directive; the adverse personnel action, as defined in Government Code Section 8547.3(b), the complainant experienced as a result of reporting the improper governmental activity, or refusing to obey an illegal order or directive; the date on which the adverse employment action occurred; and all information that the complainant possesses that shows that the adverse employment action occurred as a result of complainant's report of improper governmental activity, or refusal to obey the illegal order or directive;

(2) include as attachments all non-privileged documents, records, declarations and other information in the complainant's possession, custody, or control that are relevant to the complaint of retaliation;

(3) include as an attachment a list of all documents or records relevant to the complaint of retaliation that are not in the complaining party's possession, custody, or control, but which he or she reasonably believes to be in the possession, custody, or control of the appointing power or any individually named respondent to the complaint;

(4) identify all respondents known to the complainant (i.e., the appointing power as well as all state employees alleged to have retaliated against the complainant);

(5) have attached any complaints of retaliation previously filed with the appointing power concerning the same retaliatory acts alleged in the complaint filed with the Board, and a copy of the written response of the appointing power to the complaint, if such response has been provided to the complainant. If the appointing power provides a written response to any such previously filed complaint of retaliation to the complainant after the complaint has been filed with the Appeals Division, the complainant shall file a copy of any response with the Appeals Division within 5 days of receipt of the written response;

(6) _____ specify the relief and/or remedies sought, including the disciplinary action, if any, requested against any individual alleged to have retaliated against the complainant;

(7) _____ include a sworn statement, under penalty of perjury, that the contents of the written complaint are true, or believed by the complainant to be true, prior to filing his or her complaint with the Board, if required to do so by statute;

(8) _____ have attached a Proof of Service indicating that the complainant has served a copy of the complaint on the appointing power and all other named respondents in accordance with the provisions of Section 51.2(f); and

(9) _____ be limited to no more than 15 pages in length, except upon a showing of good cause as to why additional pages are needed. The 15-page limit does not apply to any documents attached to the complaint pursuant to the requirements of subsections (2), (3), or (5) of this section.

(f) _____ The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to the provisions of Government Code Section 19575, or when appealing a notice of rejection during probation, pursuant to the provisions of Government Code Section 19175.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.2. Acceptance of Whistleblower Complaint; Notice; Findings of the Executive Officer.

(a) _____ Within **10** *working* days of receipt of the complaint, the Appeals Division shall initiate an investigation to determine if the Board has jurisdiction over the complaint and to determine if the complainant meets the filing requirements set forth in Section 56.1. The Appeals Division shall also determine if the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code Sections 8547 *et seq.* and 19683, and Section 56.1.

(b) _____ If the Appeals Division determines that all filing requirements have not been satisfied concerning the filing of a retaliation complaint, the Appeals Division shall notify the parties in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party shall be permitted to file an amended complaint within **15** *working* days of receipt of the notice of non-acceptance of the complaint. Within **10** *working* days of receipt of the amended complaint, the Appeals Division shall initiate

an investigation to determine if the Board has jurisdiction over the complaint and to determine if the complaint meets the filing requirements set forth in Section 56.1. For purposes of determining the one year limitation period, the date that the original complaint is filed with the Board shall be deemed the filing date for the amended complaint. If the Appeals Division determines that all filing requirements have not been satisfied concerning the filing of the amended complaint, the Appeals Division shall notify the parties in writing that the amended complaint has been rejected and the reason(s) for that determination. If the Appeals Division determines that all requirements have been satisfied concerning the filing of a retaliation complaint, or an amended retaliation complaint, and that the complainant has established a prima facie case of retaliation, the Appeals Division shall notify the parties in writing that the complaint has been accepted.

(c) Within 15 *working* days after service of notice of acceptance of the complaint, each named respondent shall file with the Appeals Division and serve on all named parties a written response to the complaint. The written response shall include all non-privileged documents, records, declarations and other information in the respondent's possession, custody, or control that are relevant to the complaint of retaliation. Each written response shall have attached a Proof of Service. Each written response shall be limited to no more than 15 pages, except upon a showing of good cause as to why additional pages are needed. The 15-page limit shall not apply to those documents attached to the response as exhibits. The Appeals Division may grant an extension of time in which to file a written response to the complaint upon a showing of good cause by the requesting party.

(d) If the complainant desires to file a written reply to the written response(s) submitted by the named respondent(s), he or she shall file the reply with the Appeals Division and serve a copy of the reply on all named parties to the complaint within 10 *working* days after service of the response(s) of the named respondent(s). Each written reply shall have attached a Proof of Service. Each written reply shall be limited to no more than 10 pages, except upon a showing of good cause as to why additional pages are needed. The 10-page limit shall not apply to those documents attached to the reply as exhibits. The Appeals Division may grant an extension of time in which to file a written reply to any response received concerning the complaint upon a showing of good cause by the complainant. The Appeals Division may, in its sole discretion, condition the granting of any such request for an extension of time upon the complainant's agreement to extend the 60

working day requirement for the issuance of a Notice of Findings for a period of time commensurate with the extension of time granted to the complainant to submit his or her written reply.

(e) Upon acceptance of any written responses, the Appeals Division shall continue its investigation, with or without a hearing, pursuant to Government Code Sections 8547 *et seq* and 19683. In conducting the investigation, the Appeals Division may require any party to the complaint to submit whatever other information it deems necessary to investigate the complaint.

(f) In those instances where any party to the complaint requests, pursuant to this Section, that the appointing power produce records or documents relevant to the complaint, and the appointing power asserts a privilege or exemption as to the records or documents requested, the following procedure shall apply:

(1) Within 5 working days of the appointing power invoking a privilege or exemption concerning the requested records or documents, either the requesting party or the appointing power may submit the issue to the State Personnel Board Chief Administrative Law Judge for resolution;

(2) The requesting party and the appointing power shall submit written briefs to the Chief Administrative Law Judge, concerning the disputed documents, and indicating why the disputed documents should or should not be produced. Any such brief shall be filed within 5 working days of the date that the dispute is first submitted to the Chief Administrative Law Judge;

(3) Except as set forth in subsection (4) of this section, when submitting its brief concerning the disputed records or documents, the appointing power shall include a copy of the disputed records or documents for purposes of an in camera review by the Chief Administrative Law Judge, or his or her designee;

(4) In those cases where the appointing power declines to produce the requested documents for purposes of an in camera review on the grounds that such disclosure is not required by law, the appointing power shall cite the specific legal authority that renders the disclosure improper;

(5) The Chief Administrative Law Judge, or his or her designee, shall issue his or her decision concerning the disputed documents within 5 working days of receipt of the parties written briefs;

(6) If any party to the dispute disagrees with the decision of the Chief Administrative Law Judge, or his or her designee, they may file a petition for writ of mandate in the superior court, seeking an interlocutory review of that decision;

(7) The 60 *working* day period for the issuance of the Notice of Findings by the Executive Officer shall be tolled pending the resolution of any such dispute concerning the requested documents.

(g) Within 60 *working* days of service of the Board's notice of acceptance of the complaint, the Executive Officer shall issue and serve on complainant and each named respondent a Notice of Findings concerning the complaint of retaliation, unless the 60 *working* day period has been waived or tolled under subsections (d) or (f) of this section.

(h) The Notice of Findings shall contain findings on the allegations contained in the complaint and shall state which, if any, of the allegations contained within the complaint are deemed substantiated, as well as which, if any, of the named respondents are deemed to have engaged in improper retaliatory acts toward the complainant. Except in those instances where the findings address jurisdictional and/or procedural matters, the Notice of Findings shall specifically refer to the information offered both in support of, and in opposition to, each allegation contained within the complaint. If it is determined that any manager, supervisor, or other state civil service employee engaged in improper retaliatory acts, the Notice of Findings shall indicate whether the misconduct violated any provisions of Government Code Section 19572. The Notice of Findings shall also inform the parties of all remedies, if any, recommended by the Executive Officer in order to rectify any substantiated retaliatory conduct, including the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct toward the complainant. The Executive Officer may also, in his or her sole discretion, recommend that the complaint be assigned for an evidentiary hearing before a Board Administrative Law Judge.

(i) The Notice of Findings shall inform each named party of his or her respective right to file a Petition for Hearing Before the Board, pursuant to the provisions of Section 56.3 and 56.4, or a Petition for Order of Remedies, pursuant to the provisions of Section 56.5.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.3. Petition for Hearing by Complainant Before the Board.

(a) If the Notice of Findings finds no actionable retaliation occurred, the complainant may file a Petition for Hearing before the Board.

(b) Any complainant desiring to file a Petition for Hearing under this Section must file the petition with the Executive Officer and serve a copy of the Petition for Hearing on each respondent(s) to the complaint within 30 days of service of the Notice of Findings.

(c) Each Petition for Hearing shall be in writing, identify the facts that form the basis for the request, include the Notice of Findings, and have attached a Proof of Service indicating that the complainant has served a copy of the Request for Hearing on each respondent(s) to the complaint.

(d) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.2(g), and whether the Notice of Findings is supported by substantial evidence.

(e) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer.

(f) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution rejecting the findings of the Executive Officer and assigning the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with Board standards and issue a Proposed Decision for the Board's review and consideration.

(g) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.4. Petition for Hearing by Respondents Before the Board.

(a) If the Notice of Findings finds misconduct by the appointing authority or by a supervisor, manager, or other state civil service employee, the appointing authority, supervisor, manager, or other state civil service employee may file a Petition for Hearing before the Board.

(b) Any appointing authority, supervisor, manager, or other state civil service employee desiring to file a Petition for Hearing under this Section must file a written petition with the Executive Officer and serve a copy of the Petition for Hearing on each party to the initial complaint within 30 days of service of the Notice of

Findings. The Petition for Hearing must include the Notice of Findings and have attached a Proof of Service indicating that the appointing authority, supervisor, manager, or other state civil service employee has served a copy of the Petition for Hearing on each party to the complaint.

(c) Upon timely receipt of any Petition for Hearing filed pursuant to this section, and upon determination that the Petition conforms to the requirements of subsection (b) of this section, the matter shall be assigned to an administrative law judge, who shall conduct an evidentiary hearing in accordance with Board standards and issue a Proposed Decision for the Board's review and consideration.

(d) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.

(e) Any Decision issued by the Board in accordance with this section shall be deemed a final decision of the Board, and the individual against whom any disciplinary action is taken as a result of that Decision shall not have any right of further appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.5. Decision Adopting the Notice of Findings.

(a) If no appeal is received pursuant to the provisions of Sections 56.3 or 56.4, the Board shall, within 60 days of service of the Notice of Findings, issue a Decision adopting the Notice of Findings as its own decision in the case and ordering those remedies, if any, that are set forth in the Notice of Findings.

(b) Any Decision issued by the Board pursuant to this section shall be deemed a final decision of the Board and the individual against whom any disciplinary action is taken as a result of that Decision shall not have any right of further appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.

§ 56.6. Disciplinary Action for Proven Retaliatory Acts

(a) In those cases where the Board issues a Decision that finds that any manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall Order the appointing authority to place a copy of the Board's Decision in that individual's Official Personnel File. The Decision shall set forth the legal causes for discipline under Section 19572, and a statement of the penalty imposed on the individual. The appointing authority shall place the Decision in the individual's Official Personnel File within 30 days of the issuance of the Board's Order and shall also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 days of the issuance of the Board's Order, notify the Board that it has complied with the provisions of this section.

(b) Any Decision, as described in subsection (a), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

NOTE: Authority cited: Section 18701, Government Code.
Reference: Sections 8547.8 and 19683, Government Code.